

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

LESLIE J. SHAW,

Plaintiff,

v.

CITIMORTGAGE, INC.; et al.,

Defendants.

3:13-CV-0445-LRH-VPC

ORDER

Before the court is Defendant CitiMortgage, Inc.’s (“CitiMortgage”) Motion in Limine (Doc. #186), to which Plaintiff Leslie Shaw (“Shaw”) filed a response (Doc. #188).

I. FACTS AND PROCEDURAL HISTORY

This is a wrongful foreclosure and breach of contract action brought by Shaw against multiple defendants. In 2003, Shaw obtained a residential loan from non-party Lehman Brothers Bank (“Lehman Brothers”) for a property located in Zephyr Cove, Nevada. The loan was secured by a promissory note and deed of trust in favor of Lehman Brothers. Shortly thereafter, the loan was transferred from Lehman Brothers to defendant Bank of New York Mellon (“BNY”) in its trust capacity. At the time, defendant Northwest Trustee Services, Inc. (“NTS”) was listed as the trustee under the deed of trust.

Shaw initially made the requisite mortgage payments to non-party Aurora Loan Services (who acted as loan servicer until June 2005) and then to defendant CitiMortgage, Inc. (“CitiMortgage”) until 2011. In May 2011, Shaw and CitiMortgage allegedly entered into a loan

1 modification agreement that reduced the monthly mortgage payments for the property. In July
 2 2011, CitiMortgage allegedly repudiated the agreement and forwarded Shaw a new modification
 3 agreement. Shaw refused this new agreement and CitiMortgage allegedly resolved Shaw's
 4 mortgage account and re-booked his payments under the original May 2011 modification
 5 agreement. In December 2011, CitiMortgage again allegedly repudiated the May 2011 loan
 6 modification agreement. Thereafter, Shaw refused to make any loan payments and CitiMortgage
 7 initiated non-judicial foreclosure proceedings on the property.

8 Subsequently, on July 26, 2013, Shaw filed a complaint against defendants for wrongful
 9 foreclosure. Doc. #1, Exhibit 1. Shaw filed an amended complaint (Doc. #52) and then a second
 10 amended complaint (Doc. #109). In his second amended complaint Shaw alleged eight (8) causes
 11 of action against defendants: (1) declaratory relief against defendant Bank of New York;
 12 (2) declaratory relief against defendant CitiMortgage; (3) breach of contract; (4) breach of the
 13 covenants of good faith and fair dealing; (5) fraudulent misrepresentation; (6) negligent
 14 misrepresentation; (7) interference with prospective economic advantage; and (8) violation of the
 15 Real Estate Settlement Procedures Act. Doc. #109. Defendant NTS was dismissed from the
 16 action on January 14, 2015 (Doc. #124), and defendant BNY was dismissed on February 5, 2015
 17 (Doc. #128), leaving CitiMortgage as the sole remaining defendant.

18 On March 16, 2016, CitiMortgage filed the present motion in limine (Doc. #186), to
 19 which Shaw filed a response (Doc. #188). Trial in this matter is currently scheduled for Tuesday,
 20 May 3, 2016.

21 II. **LEGAL STANDARD**

22 A motion in limine is used to preclude prejudicial or objectionable evidence before it is
 23 presented to the jury. Stephanie Hoit Lee & David N. Finley, *Federal Motions in Limine* § 1:1
 24 (2012). The decision on a motion in limine is consigned to the district court's discretion -
 25 including the decision of whether to rule before trial at all. *See Hawthorne Partners v. AT&T
 26 Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993) (noting that a court may wait to resolve the
 27 evidentiary issues at trial, where the evidence can be viewed in its "proper context"). Motions in
 28 limine should not be used to resolve factual disputes or to weigh evidence, and evidence should

not be excluded prior to trial unless “the evidence [is] inadmissible on all potential grounds.” See, e.g., *Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004). Even then, rulings on these motions are not binding on the court, and the court may change such rulings in response to developments at trial. See *Luce v. United States*, 469 U.S. 38, 41 (1984).

Generally, all relevant evidence is admissible. Fed. R. Evid. 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. The determination of whether evidence is relevant to an action or issue is expansive and inclusive. See *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384-87 (2008). However, the court may exclude otherwise relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” Fed. R. Evid. 403. Further, evidence may be excluded when there is a significant danger that the jury might base its decision on emotion, or when non-party events would distract reasonable jurors from the real issues in a case. See *Tennison v. Circus Circus Enterprises, Inc.*, 244 F.3d 684, 690 (9th Cir. 2001); *United States v. Layton*, 767 F.2d 549, 556 (9th Cir. 1985).

III. DISCUSSION

In its motion in limine, CitiMortgage seeks to exclude the following twenty-one (21) separate categories of evidence or argument at trial: (1) evidence from previously dismissed claims; (2) evidence of claims for relief already dismissed; (3) evidence of other litigation involving CitiMortgage; (4) evidence related to dismissed defendants BNY and NTS; (5) evidence of non-judicial foreclosure proceedings related to the property at issue; (6) evidence of CitiMortgage’s compliance with law; (7) evidence outside of the three designated expert opinions of Shaw’s expert Daniel Leck; (8) evidence regarding Daniel Leck’s expert opinion on “distressed sales” in the marketplace, such as short sales, and home pricing trends since April 3, 2013; (9) evidence of the value of the subject property; (10) evidence relating to the enforceability of the subject loan; (11) evidence of attorney fees and costs incurred by Shaw prior to July 18, 2014; (12) evidence of Shaw’s alleged emotional distress; (13) evidence relating to payments made to CitiMortgage on the subject loan; (14) evidence of lost rental damages;

1 (15) evidence of repair costs and loss of use damages to the subject property; (16) evidence
 2 relating to the 2008 financial crisis; (17) bifurcation of punitive damages; (18) evidence of
 3 CitiMortgage's financial condition; (19) evidence regarding Shaw's communication with
 4 CitiMortgage's counsels of record during the pendency of this litigation; (20) illustrative or
 5 demonstrative evidence not previously agreed upon by the parties; and (21) any witness or
 6 exhibit not previously disclosed in discovery. *See Doc. #186.*

7 As a preliminary matter, the Court notes that trial in this case will be a bench trial.
 8 Because of this, the Court will be in a better position to rule upon challenges to witnesses and
 9 evidence during the course of trial when there will be more context and a fuller understanding of
 10 the issues and evidence in the case. "Where the gatekeeper and the factfinder are one and the
 11 same—that is, the judge—the need to make such decisions prior to hearing the testimony is
 12 lessened." *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006). A primary purpose of a motion in
 13 limine is to permit the pre-trial resolution of evidentiary disputes without having to present
 14 potentially prejudicial evidence in front of a jury. *See Pinal Creek Group v. Newmont Mining*
 15 *Corp.*, No. CV-91-1764-PHX-DAE, 2006 WL 1766494, at * 1 (D. Ariz. June 26, 2006). In
 16 resolving evidentiary disputes before trial, motions in limine avoid the need to "unring the bell"
 17 once inadmissible evidence has been presented to the jury. *Id.* (internal quotation marks and
 18 citation omitted).

19 The rationale underlying pre-trial motions in limine does not apply in a bench trial, where
 20 it is presumed the judge will disregard inadmissible evidence and rely only upon competent
 21 evidence. *Id.* When ruling on motions in limine, a court is forced to determine the admissibility
 22 of evidence without the benefit of the context of trial. *See LaConner Assocs. Ltd. Liab. Co. v.*
 23 *Island Tug and Barge Co.*, No. C07-175RSL, 2008 WL 2077948, at *2 (W.D. Wash. May 15,
 24 2008); *Rettiger v. IBP, Inc.*, No. 96-4015-SAC, 1999 WL 318153, at * 1 (D. Kan. Jan. 6, 1999)
 25 (recognizing that a court is almost always better situated during the actual trial to assess the value
 26 and utility of evidence). Moreover, because "the judge rules on this evidentiary motion, in the
 27 case of a bench trial, a threshold ruling is generally superfluous." *United States v. Heller*, 551
 28 F.3d 1108, 1112 (9th Cir. 2009). The more prudent course in a bench trial, therefore, is to

1 resolve evidentiary doubts in favor of admissibility. *See Commerce Funding Corp. v.*
 2 *Comprehensive Habilitation Servs., Inc.*, No. 01 Civ 3796(PKL), 2004 WL 1970144, at *5
 3 (S.D.N.Y. Sept. 3, 2004). “There is less need for the gatekeeper to keep the gate when the
 4 gatekeeper is keeping the gate only for himself.” *United States v. Brown*, 415 F.3d 1257, 1269
 5 (11th Cir. 2005).

6 **1. Evidentiary Exclusions Based Solely on Relevance and/or Unfair Prejudice**

7 CitiMortgage requests that the court exclude sixteen (16) categories of evidence based
 8 solely on relevance and/or unfair prejudice. These categories of evidence include: evidence from
 9 previously dismissed claims, evidence of claims no longer at issue at trial, evidence of other
 10 litigation involving CitiMortgage, evidence related to dismissed defendants, evidence of non-
 11 judicial foreclosure proceedings on the subject property, evidence of CitiMortgage’s compliance
 12 with federal and state law, evidence of the subject property’s value, evidence relating to the
 13 enforceability of the subject loan, evidence of attorney’s fees, evidence of emotional distress
 14 damages, evidence of payments made to CitiMortgage on the underlying loan, evidence of rental
 15 loss damages, evidence of repair and loss of use costs, evidence relating to the 2008 financial
 16 crisis, illustrative or demonstrative evidence not jointly agreed upon by the parties, and
 17 undisclosed witnesses or exhibits. *See Doc. #186.*

18 Generally, a motion in limine based solely on relevance or unfair prejudice is improper
 19 when the matter is set for a bench trial. *See Pinal Creek Group*, 2006 WL 1766494, at *1.
 20 Further, as the fact finder in this action, the court will be able to make any evidentiary rulings at
 21 trial when the court will be better situated to assess the relevance, prejudice, and utility of the
 22 challenged evidence in context. Accordingly, the court shall deny these evidentiary challenges
 23 without prejudice.

24 **2. Expert Witness Testimony**

25 CitiMortgage next requests that the court exclude certain testimony by Shaw’s expert,
 26 Daniel Leck (“Leck”). Specifically, CitiMortgage requests the court exclude any testimony by
 27 Leck falling outside the scope of his expert reports or that he cannot substantiate with personal
 28 knowledge. Further, CitiMortgage argues that Leck should be precluded from proffering an

1 expert opinion on “Distressed Sales” in the marketplace, such as short sales, as well as home
 2 pricing trends since April 3, 2013, as he does not possess specific and particular knowledge of
 3 this subject area.

4 In his opposition, Shaw states that he has no intention of introducing or seeking
 5 testimony from Leck that is outside the scope of his expert report or for which he does not have
 6 expert knowledge in the subject area. Therefore, because Shaw has indicated that Leck will not
 7 testify to the challenged subject areas, the court shall deny these evidentiary challenges without
 8 prejudice. If issues related to the testimony of Leck arise at trial, CitiMortgage can raise any
 9 objections at that time.

10 **3. Punitive Damages**

11 CitiMortgage also requests that the court bifurcate the trial into two separate phases - a
 12 liability phase and a punitive damages – and exclude evidence related to punitive damages
 13 including its financial condition from the liability phase of the trial.

14 Generally, “Nevada law requires bifurcation of the punitive damages phase of a trial.” *In*
 15 *re USA Commerical Mortgage Co., No. 2:07-CV-00892-RCJ, 2010 WL 4702341, at *2 (D. Nev.*
 16 *Nov. 12, 2010).* The purpose of bifurcating a trial is to prevent prejudice to a defendant by
 17 allowing evidence of its financial condition to be presented to a jury when there has not yet been
 18 a finding that punitive damages are warranted. As this is a bench trial before the court, the
 19 purpose behind bifurcation is already served where the court is the factfinder. Therefore, the
 20 court shall deny CitiMortgage’s request for bifurcation and for exclusion of evidence related to
 21 punitive damages.

22 **4. Protected Settlement Negotiations**

23 CitiMortgage’s final argument is that the court should exclude any communications
 24 between Shaw and Attorney Colt Dodrill or CitiMortgage’s other counsels of record during the
 25 pendency of this litigation on the basis of attorney client privilege and on the basis of these
 26 communications being protected settlement conference communications under Federal Rule of
 27 Evidence 408.

1 The court shall deny CitiMortgage's motion in limine as to this challenge without
2 prejudice and reserve this issue for trial. At this time the court does not know what evidence or
3 testimony is being sought and, as such, cannot determine whether any of this amorphous
4 evidence constitutes attorney client privilege or protected settlement conference
5 communications. If any specific issues arise at trial related to evidence that should be excluded
6 for either of these reasons, CitiMortgage can make appropriate objection at that time.

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8 IT IS THEREFORE ORDERED that defendant's motion in limine (Doc. #186) is
9 DENIED without prejudice.

10 IT IS SO ORDERED.

11 DATED this 26th day of April, 2016.

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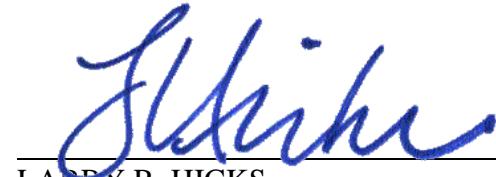
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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE